IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1807

STATE, ex rel GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, move the Courts to dismiss this appeal on the following grounds:

1. The United States Supreme Court lacks jurisdiction to hear this appeal under 28 USC §1257(2).

2. The appeal does not present a substantial federal question.

3. The federal questions sought to be reviewed were not expressly passed on by the Supreme Court of the State of New Mexico.

4. The judgment from which the appeal is sought to be taken rests on an adequate non-federal basis.

Appellees further move the Court to award double costs pursuant to title 28 U.S.C., Section 2103. As reason therefor, Appellees state that this appeal is frivolous and has been brought solely for purposes of delay.

STATEMENT OF THE CASE

Appellees are generally in agreement with the statement of the case provided the Court by Appellants in their Jurisdictional Statement. The statement includes many matters of motivation, observation and opinion which are purely personal to counsel for Appellants and thus not properly raised here, but Appellees choose not to quarrel with or object to most such matters. There is, however, additional information which should be provided the Court, and, objection must be lodged against certain portions of the Statement.

First, as additional information, it should be noted that in each of the proceedings initiated by Appellants attempting to overturn the Court of Appeals' decision herein, Appellants asserted several non-federal and non-constitutional grounds in support of their contentions. Pertinent portions of Appellants' Motion for Rehearing in the Court of Appeals[1] and the Petition for Writ of Certiorari in the New

[1]App. A *infra*.

Mexico Supreme Court,[2] containing those contentions are appended hereto. In addition, the entire text of the Petition for Writ of Mandamus[3] is appended, absent the exhibits which were attached to it originally.

Second, Appellees object to Appellants inserting into their statement of the case any matters contained in Appendix H to their Jurisdictional Statement, the "Attorney's Certificate." Appendix H was apparently drafted by counsel for Appellants exclusively for use in this appeal. Its appearance in the Jurisdictional Statement was the first revelation Appellees had of its existence. It was not filed in support of any of Appellants various motions and petitions filed subsequent to the entry of the New Mexico Court of Appeals Opinion in the original action herein.

Appellants are apparently attempting to supply this Court with information, factual and legal about New Mexico law, procedure, tradition and history which they did not provide the New Mexico Courts during their deliberations. Obviously, it is absolutely improper for Appellants to inject new factual contentions into the proceedings at this point. It requires no citation to assert that the United States Supreme Court, indeed all appellate courts, may only, and can only, review the cases before them on the record generated in the proceedings in the lower courts. Allowing Appellants to file affidavits such as Appendix H would require the appellate courts to re-examine and re-find facts in their resolution of appeals brought before them. The problems created by allowing the filing of pleadings such as Appendix H are glaring and demonstrate the absurdity of allowing the practice.

[2]App. B *infra*.
[3]App. C *infra*.

The entire thing might be unworthy of note were it not for the sweeping nature of the contentions made by Mr. Klecan in his Attorney's Certificate, the apparent use being made of his statements and the inaccuracy of certain of the statements contained therein. The Attorney's Certificate includes the following statements:

> Oral argument was a traditional right recognized as such by all the bench and bar.[4]
>
> I believe the rules of Appellant (sic) Procedure provide for an oral argument on an appeal.[5]
>
> The practice of law in New Mexico continues then to function, as to oral argument, at the whim of the New Mexico Court of Appeals.[6]
>
> I sincerely believe that oral argument was a vital step in a complete presentation of my client's legal position in this case.[7]
>
> The Opinion neglected to even treat one major new issue raised in the brief.[8]

Clearly, Appellants seek to create, or bolster, their substantive contentions in this appeal by reference to the material in the Attorney's Certificate. This Appellants simply cannot do.

Finally, through Appendix H, counsel for Appellants is injecting himself into the action as a witness. The tenor of the Attorney's Certificate is purely and simply that of

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[4]Jurisdictional Statement, p. 34.
[5]Ibid.
[6]Ibid.
[7]Ibid.
[8]Id., p. 35.

a witness called to explain the workings of the New Mexico Appellate Courts. It is fundamental that the factual knowledge [or legal opinion] held by an attorney is absolutely useless and irrelevant as evidence in any case where he is acting as the attorney of record. One cannot be both witness and attorney in the same case. If counsel wished to take up Appellants cause by testifying on their behalf, he should have done so long ago.

Appellants efforts are neither novel or laudable, and should not be rewarded with consideration. Appendix H should be stricken from the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether an opinion of the Court of Appeals of the State of New Mexico is a "Statute" of the State of New Mexico within the meaning of Title 28 USC, §1257(2).

2. Whether federal questions substantial enough to warrant assumption of jurisdiction of this appeal by the United States Supreme Court have been raised.

3. Whether the federal questions sought to be decided were passed upon expressly enough by the New Mexico Supreme Court to warrant the assumption of jurisdiction of this appeal by the United States Supreme Court.

4. Whether the decision of the New Mexico Supreme Court was based on adequate, non-federal grounds.

ARGUMENT

POINT I

THE OPINION OF THE COURT OF APPEALS IS NOT A STATUTE WITHIN THE MEANING OF 28 USC §1257(2)

Appellants appear to take for granted that this Court has jurisdiction of this appeal under Title 28 USC §1257(2). The provision is cited only once in their Jurisdictional Statement, where Appellants state, without benefit of citation, that pursuant to §1257(2):

> . . . the actions of the Court of Appeals of the State of New Mexico have the full force and effect of a statute.[1]

Appellants apparently feel that the Opinion of the Court of Appeals, or perhaps the single sentence of the Opinion denying oral argument, is a statute within the meaning of §1257(2)[2]. Appellees submit that in this conclusion, Appellants have grievously erred.

Section 1257(2) grants the U.S. Supreme Court jurisdiction to review by appeal, decisions of the highest court of a state where there has been drawn in question the validity of a "statute" of the state on the grounds of its being repugnant to the constitution or laws of the United States; and, the state court's decision is in favor of the statutes' validity.[3] The specific inquiry on appeal to the United States Supreme Court under §1257(2) is, thus, whether the challenged statute itself [not the judicial decisions upholding it] is contrary to the constitution or the

[1]Jurisdictional Statement, p. 2.
[2]Id., App. F.
[3]28 USC §1257(2).

laws of the United States. The U.S. Supreme Court cases construing the word "statute" as used in §1257(2), and its predecessors have uniformly held that the opinions and decisions of the state courts are not in and of themselves "statutes" of the states.[4]

A clear distinction has been drawn, and uniformly followed, between instances where, in the process of litigating the primary issues in that case a state court has construed a statute [some act of the legislative power of the state] in a manner which gives the statute an unconstitutional effect, and, instances where a statute of a state has been directly attacked as unconstitutional and the state court has upheld the statute in the face of the attack. In the former instance, jurisdiction under §1257(2), or its predecessors, has always been denied because only the judicial branch or power of the state has been involved.[5]

In the case of *Central Land Company v. Laidley*,[6] for example, the court was presented with a question involving the correctness of the construction placed on a state statute controlling the proper method of acknowledgment by married women of deeds conveying real property. The Appellant in *Laidley* asserted that the construction given the statute by the West Virginia Court of Appeals had the effect of impairing the obligation of a contract contrary to the federal constitution. The impairment of contract claim was premised on the assertion that under the state courts' prior

[4]Railroad Company v. Rock, 71 U.S. 177 (1866); Knox v. Exchange Bank, 79 U.S. 379 (1870); Commercial Bank of Cincinnati v. Buckingham's Executives, 46 U.S. 316 (1847); Lehigh Water Company v. Eaton, 121 U.S. 388 (1887); Central Land Company v. Laidley, 159 U.S. 103 (1895); Wood v. Brady, 150 U.S. 18 (1893); St. Paul, Minneapolis and Manitoba Railway Co. v. Todd County, 142 U.S. 282 (1892); Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).
[5]Ibid.
[6]159 U.S. 103 (1495).

construction of the statute certain rights had vested in the Appellants, and, the state courts could not, constitutionally affect such vested rights by later altering their construction of the statute.[7]

Appellants in *Central Land Company v. Laidley*[8] attempted to proceed to the United States Supreme Court on a writ of error pursuant to a predecessor of §1257(2). Appellee Laidley's motion to dismiss for want of jurisdiction was granted, the court stating:

> The appellate jurisdiction of this court upon writ of error to a state court on the ground that the obligation of a contract has been impaired can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court. . . . If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state had erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the state and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U.S. 5 How. 317, 343 [other citations omitted].[9]

[7] 159 U.S. at 106.
[8] 159 U.S. 103 (1891).
[9] 159 U.S. at 109, 110.

In *Commercial Bank of Cincinnati v. Buckingham's Executors*,[10] Appellants sought to appeal a decision of the Supreme Court of Ohio to the United States Supreme Court under §25 of the Judiciary Act of 1789,[11] the original grant of the appellate jurisdiction now found in §1257(2). Appellants' theory was that the State Supreme Court had erred in construing a certain state statute, and that the misconstruction made the statute unconstitutional. The Court through Justice Grier, was compelled to comment that the Appellants had reached a "most strange conclusion from such premises,"[12] but went on to explain as follows:

> But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the Constitution of the United States has been decided by the state courts to be valid, and not where any act admitted to be valid has been misconstrued by the court.[13]

The general principle to be gleaned from the cases cited above is that "statute" as used in §1257(2) is limited in its scope to exercises of the states' legislative powers and does not encompass purely judicial pronouncements.[14]

The case of *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*,[15] is most instructive on the point. There, the plaintiff-appellant had been granted an exclusive

[10] 46 U.S. 316 (1847).
[11] 1 Stat. at L. 73, 85, Chapt. 20.
[12] 46 U.S. at 341.
[13] 46 U.S. at 341.
[14] New Orleans Waterworks Company v. Louisiana Sugar Refining Company, 125 U.S. 18 (1888); King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928); Lathrop v. Donahue, 367 U.S. 820 (1961); DeBacker v. Brainerd, 396 U.S. 28 (1969).
[15] 125 U.S. 18 (1888).

right to supply the City of New Orleans with water. Many years subsequent to the granting of such exclusive right to the plaintiff-appellant, the City of New Orleans passed an *ordinance* pursuant to authority of a state statute, giving the defendant-appellee permission to obtain its own water for use at its facilities alone. Appellant filed an action seeking injunctive relief asserting that its exclusive right covered all matters, such as the laying of pipe and conduit, relating to the transport of *all* water within the city. The trial court denied it the relief sought, stating that the appellees' case came within a certain exclusion in the statute relied on by appellant. The Supreme Court of Louisiana affirmed. On motion, the United States Supreme Court dismissed the appeal for lack of jurisdiction reasoning that even though the permission was granted appellee through the form of an ordinance, the passing of the ordinance involved no exercise of legislative power because the statute appellant was relying on itself established a class of persons to be exempted from its operation. The City therefore was left with a purely administrative chore of determining who came within the exemption. Passage of the ordinance was thus not a legislative, but an administrative act; and, the ordinance was not a statute but a mere license. Therefore there was no statute of the state which could be tested for repugnancy to the U.S. Constitution, with the necessary result that the court lacked jurisdiction to hear the appeal.[16]

In *Lathrop v. Donahue*,[17] the Supreme Court was asked to determine the constitutionality of an order of the Wisconsin Supreme Court integrating the Wisconsin State Bar. Plaintiff-appellant filed an action seeking a refund of the dues required of him by the order. In examining its jurisdiction under §1257(2), the court observed that it was the nature of the action taken which controlled the question of whether or not such action constituted a "statute" within the meaning of §1257(2).[18] The United States Supreme Court noted that the final action of the Wisconsin Supreme Court was taken after a period of interplay with the state legislature, both entities seeking a workable policy of integration. The United States Supreme Court also noted that the Wisconsin Supreme Court had acknowledged that in issuing its order it was consciously implementing public policy as declared by the legislature; even though the legislature could not require it to do so. The United States Supreme Court, thus carefully agreed with the Wisconsin Supreme Court's view that its action in issuing the order was not adjudicatory but legislative in character. On that basis, the United States Supreme Court found it had jurisdiction to hear the appeal.

Of note, also, is the case of *DeBacker v. Brainerd*[19] where the Supreme Court dismissed an appeal from a denial of a state habeas corpus proceeding because, among other things, the claimed constitutional defect in state juvenile criminal procedure asserted by appellant was derived from state case law, not from any statutory provisions, and, therefore, the matter could not be brought for review by appeal under §1257(2).[20]

The holdings of the cases cited hereinbefore are, of course, eminently practical as well as legally astute. If the Supreme Court were to broaden the scope of the term "statute" to include judicial opinions, it would undoubtedly be

[16]125 U.S. 18 (1888).
[17]367 U.S. 820 (1961).

[18]The Court cited King Mfg. Co. v. Augusta, supra, n. 14, which contains an exhaustive history of the predecessors to §1257(2).
[19]396 U.S. 28 (1969).
[20]396 U.S. at 32, fn. 6.

inundated by appeals complaining of the actions of state courts across the nation. Every time a state court exercised its discretion in an arguably unconstitutional manner, the Supreme Court could be called on to review the actions of the states' judiciary. Such a construction of §1257(2) would obviously place an impossible burden on the Supreme Court and more importantly, would seriously undermine the concept of federalism which is the genius of the United States system of government.[21]

Applying the reasoning of the numerous cases cited above to the instant case, it is clear that jurisdiction under §1257(2) cannot be sustained. Here, the New Mexico Court of Appeals was called upon to decide an appeal under the New Mexico Workmen's Compensation Act.[22] In the course of its deliberations, the Court of Appeals decided that it could decide the appeal questions without oral arguments. It can safely be assumed that the Court of Appeals was aware of the various state provisions dealing with oral argument when it made its decision. Assuming the Court was cognizant of possible problems in its denial of oral argument, it must have examined such state provisions and construed them as allowing it to act as it did.

If the Court of Appeals actually committed some as yet unascertained error in denying Appellants oral argument, it was error only in the construction of applicable state constitutional provisions, state statutes, and state procedural rules.

Courts are, after all, supposed to construe statutes in the course of their deliberations. Statutory construction in the adjudicatory setting is purely a judicial, not a legislative function. Thus, the Court of Appeals' decision can only be viewed as the purest sort of judicial action.

[21]See cases cited at fn. 4.
[22]N.M.S.A. 59-10-1 *et seq.*

In filing their petition for a writ of mandamus, Appellants were questioning the correctness of a judicial ruling. In no sense can it be said that the petition for writ of mandamus challenged the validity of a state statute as required by §1257(2) because a decision construing a statute cannot itself become a statute.[23].

Moreover, as noted by Appellants, the Court of Appeals has no rule making powers.[24] The Court of Appeals does not even possess superintending powers over the state's lower courts. Therefore, the Court of Appeals, by definition, cannot exercise the legislative power of the State of New Mexico.

The United States Supreme Court therefore lacks jurisdiction to hear this appeal and the appeal should be dismissed with double costs awarded appellees pursuant to Title 28 USC, Section 2103.[25]

POINT II

APPELLANTS HAVE RAISED NO SUBSTANTIAL FEDERAL QUESTIONS FOR REVIEW

As Appellees interpret Appellants rather cryptic statement of the federal questions being raised by them, Appellants essentially have three points they are pursuing:

[23]See cases cited at fn. 4 *supra.*
[24]N.M. Stat. Ann. §18-1-1 (1953 Comp.).
[25]28 USC §2103.

1) The federal Constitution required that notice be given Appellants of the *possibility* of denial of oral argument prior to the publication of the Court of Appeals' Opinion below. (See part A for discussion)

2) The Court of Appeals has by its actions unlawfully promulgated a new rule of appellate procedure in New Mexico, thus violating the federal constitutional guarantee of due process. (See part B for discussion)

3) Due process of law under the federal constitution extends to representation by counsel on appeal in civil cases, and the denial of oral argument deprived Appellants of their right to counsel.[26] (See part C for discussion)

The existence of a substantial federal question involving any of the three points is not supported by the cases cited by Appellants or any other authority. Each of the three points will be discussed separately.

PART A.

There is no exaggeration in asserting that notice and hearing are fundamental concepts in American jurisprudence. They are the vehicles through which our legal institutions seek accurate solutions to problems and through which the integrity of the individual is protected from assault by and through the state.[27] As fundamental as notice and hearing are, however, they are not required in every conceivable case of government impairment of private in-

[26]Jursdictional Statement, pp. 7-12.

[27]Subrin and Dykstra, Notice and the Right to Be Heard: The Significance of Old Friends, 9 Harv. Civ. R. Civ. Lib. Law Rev. 449 (1974).

terest.[28] In deciding what is required in any given set of circumstances, inquiry must be made to determine the nature of the governmental function involved, as well as the nature of the private interest being affected by the governmental action.[29]

In the case at bar, Appellants assert that they have a private interest in preventing tyranny by the state, and that they have a federal constitutional right to be free of unlawful and "arbitrary actions by a state court of appeals;"[30] both of which must be protected or implemented through the Fourteenth Amendment of the Federal Constitution and the notice requirements thereof.[31]

The nature of the governmental function involved and being protected is the freedom of the states' courts to exercise their sound judgment in interpreting their own rules, and to exercise their sound discretion in implementing those rules which are found to be non-mandatory.

Appellants assert that notice must be given of any substantial change in the Appellee Court of Appeals' procedures, even if the applicable rules are structured such that the decision by the court is purely discretionary, with the decision not having a forseeably substantial effect (in Appellees' view) on the final outcome of the action. Oral argument is thus urged by Appellants to be a substantial step in a fundamentally fair appeal.

Appellees maintain that there is no basis in the cases

[28]Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970).

[29]Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Stanley v Illinois, 405 U.S. 645 (1972).

[30]Jurisdictional Statement, p. 10.

[31]U.S. Const. Amend. XIV.

for holding that oral argument is a substantial part of a fair appeal.[32]

First, Appellants concede that there is no constitutional requirement that a state guarantee an appeal.[33]

Second, the cases dealing with the question of whether oral argument is a constitutional requisite to the conduct of a fair hearing, primary or appellate, have uniformly held that being heard orally is not a matter of constitutional magnitude.[34]

FCC v. WJR,[35] is the leading case. There the FCC had licensed another radio station at WJR's frequency and in WJR's effective area. The license was issued without notice to WJR. A petition for reconsideration was filed by WJR along with an alternative request to delay action on the permit until a decision was made in a "clear channel" proceeding where WJR was seeking an increase in its power. The FCC denied the requests without an oral hearing of any kind, and rendered its opinion. The U.S. Court of Appeals for the District of Columbia found that there was a right to oral argument guaranteed by the Fifth Amendment, and remanded the case for oral argument.

The United States Supreme Court granted certiorari stating:

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[32]FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[33]Jurisdictional Statement, p. 7.

[34]FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); National Labor Relations Board v. Local No. 42, International Association of Heat and Frost Insulators and Asbestos Workers [hereinafter NLRB v. Local No. 42], 476 F.2d 275 (3rd Cir. 1973); George W. Bennett Bryson Co. Ltd. v. Norton Lilly & Co. Inc., 502 F.2d 1045 (5th Cir. 1974).

[35]337 U.S. 265 (1949).

> Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained. So taken it would require oral argument upon every question of law. . . . This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved . . . and regardless of the fact that full opportunity for judicial review may be available.[36]

The court noted that it had held that an oral hearing was necessary to assure fairness in some instances, but that in others, argument submitted in writing is sufficient.[37]

> Certainly the Constitution does not require oral argument in *all* cases where only insubstantial of frivolous questions of law, *or indeed even substantial ones* are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings . . .[38] (emphasis supplied)

It is important to note that in *FCC v. WJR*,[39] the Court was dealing with the right to an oral hearing within the context of initial proceedings under the primary jurisdiction of the FCC pursuant to a statute which provided "reasonable opportunity to show cause"[40] [the administrative equivalent of trial on the merits]. In the case at bar, Appellants were not at the primary, fact-finding stages of the litigation. They had full opportunity to present their evidence and arguments at the trial court. On the appellate level, Appellants supplied the Court of Appeals with a full transcript of the proceedings, and they were twice allowed

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[36]337 U.S. at 275.

[37]337 U.S. at 276.

[38]337 U.S. at 276.

[39]337 U.S. 265 (1949).

[40]47 USC §312(B).

to brief their points on appeal as fully as desired.[41] Notice and hearing in good measure had, thus, already been afforded Appellants when oral argument was denied. That denial cannot be of constitutional import since the private interest involved has been held not to be major.[42]

It should be noted that all of the major new cases treating the question of notice and hearing have involved notice of the fact of the institution of primary, first stage proceedings which are likely to have an immediate impact on individual personal interests.[43] Lack of notice and hearing at that primary stage could very easily make the subsequent remedies available purely illusory.[44] The contrast with the case at bar immediately reveals that notice of denial of oral argument was not required, in any sense, in this case.

In *NLRB v. Local No. 42*,[45] the court held that denial of oral argument, at any stage of the appellate process, was not inconsistent with the federal Constitution or the Federal Rules of Appellate Procedure, specifically, Rule 34(b), which states, in pertinent part:

> . . . requests [for additional time for argument] may be made by letter addressed to the Clerk reasonably in advance of the date fixed for argument and shall be liberally granted if cause therefor is shown. . . .[46]

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[41]N.M. Stat. Ann. §21-12-8 (1974 Supp.).

[42]See cases cited at fn. 34.

[43]Arnett v. Kennedy, ____ U.S. ____, 94 S.Ct. 1633 (1974); Mitchell v. W. T. Grant Co., ____ U.S. ____, 94 S.Ct. 1895 (1974); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[44]Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972).

[45]476 F.2d 275 (3rd Cir .1973).

[46]Fed. R. App. Proc., Rule 34 (b).

The court held that the cited language did not mandate oral argument either explicitly or by implication, stating:

> Such a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision-making process.[47]

The courts have thus subordinated the "right" to oral arguments to their own need for discretion in the search for efficiency and good decision making.[48] It is apparent that Appellees herein are aware of the necessity and desirability of husbanding their time.

Oral argument on appeal is, thus, not required by the federal constitution.

Oral argument on appeal is also not required by any constitutional or statutory provision of the State of New Mexico; Appellants assumption, stated without analysis, to the contrary notwithstanding.

The New Mexico Constitution guarantees one appeal;[49] but it has already been demonstrated above that oral argument on appeal is not required by the federal constitution. Absent language concerning oral argument, the New Mexico Constitution is neutral on the question of whether a right thereto exists under state law.

There are only two other statutory provisions of the

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[47]476 F.2d at 276.

[48]See, also George W. Bennett Bryson & Co. Ltd. v. Norton Lilly Company, Inc., 502 F.2d 1045 (5th Cir. 1974), where NLRB v. Local No. 42 was explicitly followed. Measuring the criteria outlined by the Court in *Norton Lilly* against the proceedings in the case at bar, it is clear that this was not an appropriate case for oral argument at any rate. 502 F.2d at 1050.

[49]N.M. Const. Art. VI §2.

State of New Mexico which are applicable.[50] Section 16-2A-1 is part of the Supreme Court's Miscellaneous Rules, while §21-12-18 is Rule 18 of the Rules of Appellate Procedure. Fairly read, these two provisions do not make oral argument on appeal a mandatory matter. In fact, the converse is true. All of the discretionary language found in the sections deals with the New Mexico appellate courts' discretionary power to hear [or not hear] oral arguments.[51] On the other hand, all of the mandatory language of the sections are purely administrative and directional.

It is conceded that no New Mexico case has explicitly construed the cited sections. It is obvious, however, that the New Mexico Court of Appeals and Supreme Court have interpreted the statutes in accordance with Appellees' theory herein. Since the question involves the interpretation of state statutes, drafted by one of the courts interpreting them, the United States Supreme Court must accept the state courts' interpretation.[52]

Thus, there is no mandatory right to oral argument on appeal under the laws of the State of New Mexico.

Absent a federal constitutional requirement of oral argument and absent a state right to oral argument, Appellants cannot show any personal interest in life, liberty or property in connection therewith which must be protected by the giving of notice. Absent a protectible interest no requirement of notice can arise,[53] and, thus, no substantial federal question has been raised by the appeal.

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[50]N.M. Stat. Ann. §16-2A-1(b) & (d); N.M. Stat. Ann. §21-12-18(a) & (c). See Jurisdictional Statement, App. J for the text of these sections.

[51]Thus, oral argument will be deemed waived if a party does not file a timely request therefor, unless the court orders arguments *sua sponte*. N.M. Stat. Ann. §16-2A-1(d); N.M. Stat. Ann. §21-12-18(c).

[52]Missouri *ex rel* Hurwitz v. North, 271 U.S. 40 (1926); Williams v. Kaiser, 323 U.S. 471 (1945).

Certainly, the cases cited by Appellants afford them no succor. *Twining v. New Jersey*,[54] which Appellants utilize as the cornerstone of their argument, concededly is a landmark decision in the development of modern due process theories. However, *Twining* involved only the question whether the due process clause of the Fourteenth amendment applied the restrictions of the Fifth Amendment prohibition against self-incrimination to the states. The Court, in holding that the Fifth Amendment did not apply to the states, embarked on a lengthy discourse concerning the meaning of due process. In the midst of this discourse, the court observed that in the evolution of the due process concept, the courts would have to be careful not to depart recklessly from old norms. The Court stated its cautionary note as follows:

> But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.[55]

It is obvious that Appellants' paraphrase of the above quote is inaccurate and ascribes to it a narrow definition which suits their needs but which is not justified or supported by the context in which it appears in the case.

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[53]Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Arnett v. Kennedy, ____ U.S. ____, 94. S.Ct. 1633 (1974); Mitchell v. W. T. Grant Co., ____ U.S. ____, 94 S.Ct. 1895 (1974).

[54]211 U.S. 78 (1908).

[55]211 U.S. at 101.

Appellants cite *FCC v. WJR*[56] in support of their statement that denial of notice was tantamount to a denial of their appeal as of right.[57] The case does not support their contention. As described above, the narrow question decided in *FCC v. WJR* was whether due process required oral argument on a petition for reconsideration of the issuance of a license. No mention is made of any requirement of notice of the denial of an oral hearing. In fact, WJR received notice of the FCC's decision and the denial of an oral hearing simultaneously.

Similarly, *Season-All Industries, Inc. v. Turkiye Sise ve Cam Fabrikalari*,[58] is not supportive of the statement it is cited to. *Turkiye* was an appeal from an order granting summary judgment in favor of defendant. The real question at issue involved the normal inquiry whether as a matter of law there was a factual question which precluded summary judgment. As an aside, more by way of a lecture to the district court, the Court of Appeals noted that it was undesirable to decide summary judgment motions on briefs alone unless it was made clear to the parties that all affidavits necessary to consider the motion were to be filed with the brief. The language dealing with a hearing is thus the purest sort of dictum and has no application to the facts in the case at bar.

Appellants cite *Cohen v. Hurley*,[59] for the proposition that denial of notice was tantamount to a "denial of precedent set by tradition",[60] and therefore the process was defective. *Cohen* dealt with the question whether a state could,

[56] 337 U.S. 265 (1949).
[57] Jurisdictional Statement, p. 8.
[58] 425 F.2d 34 (3rd Cir. 1970).
[59] 366 U.S. 117 (1961).
[60] Jurisdictional Statement, p. 8.

consistent with the Fourteenth Amendment, disbar an attorney who, relying on his state privilege against self-incrimination, had refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct. The court held that the disbarment was not violative of the attorney's due process rights, pointing out that the state, and the state bar association, had a substantial interest in conducting investigations of that kind. The court stated:

> That interest is nothing less than the exercise of disciplinary powers which English and American courts for centuries possessed over the members of the bar...[61]

Appellees frankly fail to see the connection between *Cohen v. Hurley*[62] and the notions ascribed to it in the Jurisdictional Statement.

Groendyke Transport, Inc. v. Davis,[63] is also cited in support of the proposition that lack of notice herein was tantamount to a denial of precedent set by tradition. The case actually held that summary disposition of appeals is constitutionally sound and desirable in many instances. In so holding the court noted:

> Oral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee.[64]

Southside Bank and Trust Company, et al vs. Walston and Company,[65] is cited for the proposition that even in

[61] 366 U.S. at 123.
[62] 366 U.S. 117 (1961).
[63] 406 F.2d 1158 (5th Cir. 1969).
[64] 406 F.2d at 1162.
[65] 425 F.2d 40 (3rd Cir. 1970).

jurisdictions which provide for summary disposition of cases by rule, the case below would have required oral argument. *Southside* has literally nothing to do with the appeal process or oral arguments or notice. Rather it involves an action against a bank and its principal officers for conversion of stock shares, with the indemnity rights of the parties as between themselves the prime issues on appeal.

Appellees choose to asume that Appellants meant to cite *Season All Industries, Inc.*,[66] instead. *Season All* is inapplicable also, however, because as explained above, the language concerning hearings in summary judgment determinations is pure dictum with no relation to the facts and issues of this case.

Finally, Appellants resort to the case of *Wagner Electric Manufacturing Company v. Lyndon*,[67] to bolster their claim that a major violation of due process has occurred in this case. In *Wagner*, Plaintiff Lyndon filed a suit in the state courts of Missouri and had been granted a judgment against Wagner in the amount of $12,000.00. Wagner exhausted all possible state r· nedies attempting to overturn the judgment, but failed. Wagner even applied to the United States Supreme Court for a Writ of Certiorari to review the judgment of the state Supreme Court, but the Writ was denied it. Wagner paid the judgment and costs, after being served with a Writ of Execution, but then immediately filed suit in the United States District Court seeking an injunction against the sheriff who processed the Writ of Execution to keep him from paying the money to the original plaintiff, Lyndon. The case finally found its way into the United States Supreme Court. The United States

[66]425 F.2d 34 (3rd Cir. 1970).
[67]262 U.S. 226 (1923).

Supreme Court was so unimpressed by the assignments of error urged by Wagner that it granted a dismissal for lack of jurisdiction because of the frivolousness of the appeal, and in addition imposed damages of $1500.00 against Wagner for delaying final resolution of the matter.

Appellees assert that the *holding* of Wagner is peculiarly applicable to the case at bar.

Appellants have failed entirely to demonstrate to the court the existence of any substantial federal question arising from the lack of notice of denial of oral argument in the Court of Appeals of the State of New Mexico. This appeal should be dismissed for lack of jurisdiction and because the grounds of the appeal are frivolous.

PART B.

Appellees urge as a second factor creating a substantial federal question the notion that the actions of the Court of Appeals were taken without authority and had the effect of abrogating rules of procedure properly promulgated by the only entity able to do so, the Supreme Court of the State of New Mexico. Again, *Twining v. New Jersey*,[68] is cited in support of their contentions.

Appellants arguments here are based entirely on their unstated assumption that they have a right to oral argument in the Court of Appeals. As demonstrated in Part A above, there is no state created right to oral argument.[69]

Since there is no mandatory right to oral arguments, it

[68]211 U.S. 78 (1908).
[69]See footnotes 49-52.

cannot be asserted that the Court of Appeals has changed the procedural rules of the State of New Mexico. It is clear that this case involves nothing more than the Appellees' good faith interpretation of New Mexico procedural rules and statutes.

PART C.

Appellants assert and have requested this court to hold, that there is a federal constitutional right to "full representation by counsel"[70] on appeal in civil cases. The assertion is frivolous on its face.

Appellants cite absolutely no authority in support of their assertion, and have utterly failed to demonstrate that a substantial federal question is involved. The dearth of citation in their Jurisdictional Statement is understandable since there is no authority which supports their assertion. Appellants' assertion is literally unprecedented.

Certainly, there is no express language in the United States Constitution concerning a right to "full representation by counsel" on appeal in civil cases. Neither is there any language in the Constitution from which such a "right" can be implied.

The Constitution does provide that defendants in criminal prosecutions shall have a right to the "assistance of counsel" for their defense.[71] The Sixth Amendment was made applicable to the states, through the Fourteenth Amendment to the United States Constitution in the case of *Gideon v. Wainwright.*[72] However, the Sixth Amendment

[70]Jurisdictional Statement, p. 9.
[71]U.S. Const. Amend. VI.
[72]372 U.S. 335 (1963).

guarantee is expressly limited to criminal prosecutions and cannot be extended to civil actions.[73]

Appellants are wrong when they assert the existence of a Fourteenth Amendment right to "full representation of counsel" in civil and criminal cases.[74]

All criminal cases dealing with the right to counsel have the Sixth Amendment as their constitutional basis.[75] For example, in *United States v. Walls,*[76] a federal criminal case, defendant's counsel had not been allowed to present closing arguments to the trial court. On appeal, the Court of Appeals held that the denial of an opportunity to argue was an impermissible limitation on the right to counsel. The Court of Appeals ruling was expressly based on the Sixth Amendment. *United States v. Walls,*[77] does not establish a Fourteenth Amendment right to counsel on appeal in civil cases as alleged by Appellants.

United States ex rel Spears v. Johnson,[78] involved, again, the denial of the opportunity to present closing arguments at trial in a criminal case. The court there did mention the words "due process" in its opinion, but, all of the cases the court cited in support of its analysis[79] invoked the

[73]It is assumed that in asserting the existence of a constitutional right to counsel in civil appeals Appellants are not saying that the Sixth Amendment cases are fully analogous and applicable. Appellants cannot be asserting, for example, that the state must provide counsel on appeal for those who cannot obtain their own. See Douglas v. California, 372 U.S. 353 (1962).
[74]Jurisdictional Statement, p. 8.
[75]U.S. Const. Amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); United States v. Walls, 443 F.2d 1220 (6th Cir. 1971).
[76]443 F.2d 1220 (6th Cir. 1971).
[77]443 F.2d 1220 (6th Cir. 1971).
[78]327 F.Supp. 1021 (E.D. Pa. 1971).
[79]Including Douglas v. California, 372 U.S. 353 (1963).

Sixth Amendment for their authority. The court obviously fell prey to sloppy language and analysis.

Appellees' research has revealed no case which has directly held that the Fourteenth Amendment to the federal constitution requires "full representation of counsel" in civil cases at the trial or appellate level. Several of the cases found in the annotation cited by Appellant hold that the denial of the opportunity to present arguments to the jury or to the court, at the trial level constitutes reversible error.[80] However, none of the cases held that the error was of federal constitutional proportions. Of course, not every error committed by a trial judge can be deemed a denial of due process, even if the error results in the wrongful deprivation of liberty or property.

Appellants' citation of *Nestor v. George*,[81] is to no avail. The appeal in *Nestor* went to the merits of the controversy and did not involve in any way the right to counsel. The Appellate Court, however, apparently noticed that the trial court had limited one party's opening statement in some manner not revealed in the opinion. The court in *Nestor* undertook on its own volition to lecture the world about the right to counsel. Of course, neither of the parties in the case had seen fit to raise the point on appeal. Further, the "right" found by the court in *Nestor* was based on a provision found in the Pennsylvania Constitution not the federal constitution.[82] Thus, the language quoted by Appellants from the case is not only dictum, it is dictum grounded on authority foreign to the United States Constitution.

Granting that the cases do not reveal a basis for creating a federal constitutional right to "full representation by counsel on appeal" in civil cases, the inquiry focuses on the question whether there is a private interest involved which is strong enough and fundamental enough to require federal constitutional status and protection. In the context of the case at bar, the specific inquiry is whether oral argument on appeal is crucial enough to require constitutional protection. The discussion above in Part A of Point II definitively answers the inquiry.[38] Oral argument is rarely, if ever, so essential to fairness as to orbit to a constitutional apogee.[84]

The conclusion is inescapable that there is no federal constitutional right to counsel on appeal in civil cases. Appellants have failed to raise a substantial, or even arguable, federal question in this regard. The appeal should be dismissed.

POINT III

THE FEDERAL QUESTIONS SOUGHT TO BE RAISED HEREIN WERE NOT EXPRESSLY DECIDED BY THE NEW MEXICO SUPREME COURT

In order for the United States Supreme Court to assume jurisdiction of appeals brought to it, it must be demonstrated that the federal questions asserted were decided by the state court, or at the very least, that the judgment of the state court could not have been rendered without deciding the federal questions asserted.[85] Here, the New

[80] 38 A.L.R. 2d 1396, §4-6.
[81] 354 Pa. 19, 46 A.2d 469 (1946).
[82] 354 Pa. 19, 46 A.2d 469, 473 (1946).

[83] See footnotes 33-67.
[84] Croendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969).
[85] DeBacker v. Brainerd, 396 U.S. 28 (1969); Harding v. Illinois, 196 U.S. 78 (1904); Lawler v. Walker, 55 U.S. 149 (1852); Honeyman v. Hanan, 300 U.S. 14 (1937).

Mexico Supreme Court denied Appellants' Petition For Writ Of Mandamus without rendering an opinion.[86]

Appellants' Petition For Writ Of Mandamus[87] advanced many theories of error committed by the New Mexico Court of Appeals. Paragraphs 6 through 18 of the Petition advance certain alleged constitutional deficits of the Court of Appeals Opinion.[88] Paragraphs 19 through 21, however, urge purely state statutory grounds for issuance of the Writ.[89] It is in paragraphs 19, 20 and 21 that Appellants state most clearly their theory that the New Mexico statutes and "rules" make oral argument mandatory upon request therefor.

As discussed in Point II, Part A above, the provisions cited by Appellants do not lend themselves exclusively to Appellants' construction. An interpretation allowing for court discretion is possible, and, indeed, more likely.

Also as discussed in Point II, Part A above, an interpretation allowing for discretion negates the possibility that the constitutional deficits urged by Appellants are actually operative in the case.

In other words, construing the state provisions to allow discretion in granting oral arguments resolves all of the questions in the Petition For Writ Of Mandamus. Further, resolution of the problem is complete and requires no other inquiry.

Of course, the actual basis of the New Mexico Supreme

[86]Jurisdictional Statement, App. B.
[87]App. C *infra*.
[88]App. C *infra*.
[89]App. C *infra*.

Court's decision is not known. Thus, because the New Mexico Supreme Court could have disposed of the matter on entirely non-constitutional grounds, it is improper and unnecessary for this court to review the actions of the New Mexico court.

The appeal should, thus, be dismissed.

POINT IV

THE DECISION OF THE NEW MEXICO SUPREME COURT IS BASED ON ADEQUATE NON-FEDERAL GROUNDS

The United States Supreme Court lacks jurisdiction on appeal or certiorari to review decisions of the state courts which are based on adequate non-federal grounds.[90]

As discussed in Point III, the decision of the New Mexico Supreme Court was most probably based on a state statute and did not involve any of the federal questions urged by Appellants. In such a circumstance this court should not, in fact cannot, assume jurisdiction to review.

The appeal should be dismissed with costs assessed against Appellants.

[90]Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891).

CONCLUSION

Appellants have failed to demonstrate not only the substantiality, but the very existence, of the federal questions they urge this court to determine. The propositions urged by Appellants are frivolous. The conclusion is inescapable that this appeal has been pursued only for the sake of delaying final resolution of the real case involved here, Mary Ann Garcia's workmen's compensation action.[91] The workmen's compensation action cannot be completed, of course, until this appeal is disposed of. In the meantime, almost four years have elapsed since Mary Ann Garcia was injured on the job. To date she has received not a cent of the compensation adjudged to be her due. This appeal presents the single question whether and when Mary Ann Garcia will receive her benefits.

This appeal should be dismissed with double costs awarded Appellees.[92]

Dated

Respectfully submitted,

ORTEGA & SNEAD

by CHARLES P. REYNOLDS
Attorney of Record for Appellees
MICHAEL D. BUSTAMANTE
On the Brief
P. O. Box 2226
Albuquerque, New Mexico 87103

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[91]It should be noted that Appellants are pursuing their tactics in the state courts also. They have now appealed the Judgment on the Mandate entered in the workmen's compensation action after affirmance of the original judgment.

[92]28 USC §2103.

Proof of Service

I, Charles P. Reynolds, a member of the Bar of the Supreme Court of the United States, and Counsel of Record for the Court of Appeals of the State of New Mexico and the Honorable Joe Wood, Appellees herein, hereby certify that on 8/2, 1977, pursuant to Paragraph 1 of Rule 33, Rules of the Supreme Court, I served three copies of the above Motion to Dismiss and brief in support thereof on all parties required to be served by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the respective post office addresses of all parties requiring service.

Dated: 8/2/77

ORTEGA and SNEAD

By: Charles P. Reynolds
Charles P. Reynolds

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

MARY ANN GARCIA,

Plaintiff-Appellee,

-vs- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Appellants.

MOTION FOR RE-HEARING

Other reasons for a rehearing other than what immediately follows will be developed. First reason for rehearing, quote from the Opinion "oral argument is unnecessary" is asserted to be a lack of due process of law in violation of the Fourteenth Amendment of the United States Constitution and in violation of the Due Process Clause of the State of New Mexico, Section 18 of Article II. and that the phrase is error and/or improper procedure calling for a rehearing.

A synthesis of the argument is:

A. The Court of Appeals of New Mexico prepared and mailed to appellee and appellants a form entitled Request for Oral Argument. This is standard procedure.

B. Appellee and appellants both responded to the request and requested oral argument. See Exhibit 1 as demonstrative proof of the above.

C. Court of Appeals did not withdraw request for oral argument.

D. Court of Appeals did not indicate in any way a denial of request for oral argument.

E. Court of Appeals decided the case then stated "oral argument is unnecessary". Conclusion, due process and/or proper procedure was denied to appellants.

I

One of the grounds for the assertion of the lack of due process is the denial of oral argument, which denial constitutes a departure from the long established procedures on appeals and which was completely unannounced as to this case or any group of cases and the denial of oral argument is thus not predicated on any basis or criterion. The sole statement on the above indicates lack of due process. That sole statement in the Opinion where for the first time the parties were noticed, after the fact, that oral argument would not be granted is "oral argument is unnecessary". The summary denial in the above fashion constitutes a factor indicative of a lack of due process. The grounds for the denial is predicated upon a lack of due process, reason or basis and is solely contained in the word "unnecessary". No explanation or even indication of the "why" behind the word unnecessary is present in the Opinion nor can it reasonably be deduced from anything in the Opinion.

The composite of the above, we submit, violates due process both as to the United States Constitution and the New Mexico Constitution, supra.

As a customary procedure, which we believe to be universal, in the Court of Appeals of New Mexico, a form is submitted to counsel for all parties to the appeal wherein the Court of Appeals has asked the parties to indicate if they want an oral argument. In such submitted request, initiated by the court itself, a type of legal procedure is undertaken relative to oral argument and would make the

question of oral argument a judicial step of the appellate process. Nowhere in the mailed request or in any of its procedures is it indicated that the parties may not get it; that is oral argument. Appellants in this case requested oral argument. No indication was ever given that oral argument would not take place. Only in the last paragraph do we find a statement that the request for oral argument was denied. This, of course, coming after the case had been decided. The peremptory disposition in this matter violates due process, we submit, and if it did not violate constitutional provisions, we submit that it would violate procedures and safeguards that make this type of disposition a legal error and that the error thus involved would be in and of itself grounds for a rehearing and the granting of an oral argument.

We point out that this Opinion was authored by the Chief Judge. However, the Opinion contains two different and distinct decisions. One is the affirmance of the lower court's compensation award. The other is the unnoticed disposition of the request for oral argument. The Opinion on the compensation award was concurred in by two associate justices. The conclusion of "unnecessary" is not necessarily within the procedures for a concurrence, especially when no basis is stated. If no basis for being "unnecessary" is stated, it would be hard to conclude why any of the three judges could speak for the others in this issue. This would be true because no basis is found in the court's decision or rules of procedure which would determine an oral argument as being necessary or unnecessary. It is a practical conclusion that an author of an opinion may consider the reasons advanced in his opinion to be subjectively so overwhelming that nothing said in an oral argument would furnish any grounds for a change of mind; however, it is respectfully submitted that the very purpose of an oral argument is to permit the testing of a judicial conclusion within a well-recognized legal procedure, namely *the oral argument*.

The process by which members of a court confer and

decide a case is beyond the observation of anyone. In an opinion concurred in by concurring members, the concurrence would go not only to the result, but presumably to the reasons. However, the concurrence in another writer's opinion might be affected if contrary forces came into play through an oral argument and we submit that to close the possibility of an oral advancement of legal ideas, explanations and interpretations of facts does under the circumstances, argue against the elimination of the oral argument and argues for a reconsideration of this case with an oral argument.

We submit that this question should not be decided as a bare bone principle of constitutional law. That the issue thus presented transcends the question whether a particular principle of substantive workmen's compensation law should be applied to this case or whether this or that interpretation of a statute should be applied to this particular case. The question presented is whether the opportunity to present matters by either party can be thus handled in one sentence under the recognized consistencies and procedures established within the court. It is true that often times on any issue the spoken word, with the speaker visibly articulating his position, can be a grounds for the communication of truth which cannot be duplicated by a written document. The above becomes more cogent if parties are led to believe that they will have a right to develop vocally the ideas put on paper. A restriction upon the written word is a part of our rules of civil procedure. It has, at no time, been envisioned or decreed that every facet of development must be stated in a written brief. To deny without notice a hoped for vocalization of a written document is a suspension of due process or at least erroneous procedure, we respectfully submit.

In regard to error specifically within the Opinion, the same must be viewed in the light of denial of argument. The author of the Opinion sees facts with his own conclusions and the certitude of the terse conclusion is not borne

out by the transcript, but again this is a matter of "argument" wherein objective standards judging the conclusion should apply. Reference is made to the following conclusion as illustrative: "Both Dr. Hollinger's and Dr. Parnall's testimony meet this requirement." This again is a matter of argument. The Opinion along the same line on Page 3 says "Defendants misconstrue Dr. Hollinger's testimony." The defendants can only say that they would certainly welcome and highly desire an opportunity to argue Dr. Hollinger's testimony and its effects. How can it be said that Dr. Hollinger has produced testimony in conformity with Section 59-10-13.3 (B) during the period in question when he expressly admitted his inability to pass judgment upon that very issue? Apparently the Opinion contends, other statements by Dr. Hollinger referred to in lines 23 and 24 of the Opinion when he was not addressing himself directly to the questions at stake, override his admitted inability to be a witness for the period in question. We submit this to be error. The testimony that the Opinion cites is not in relationship to nor in response to the very question which must be decisive. The value of an oral argument is not solely elucidating points of law. More frequently, the argument is directed to pointing out the actual facts as they occurred at trial time and are reflected in the transcript. This was a very lengthy trial and the denial of an opportunity to corelate and bring before a three man court the presuasiveness of all the evidence and its interrelationship in an oral argument is a denial of a real and substantial right.

The Opinion does not pass upon a substantial number of points of error raised by the appellants. For instance, "The Court Erred in Refusing Defendant's Offer of Proof on the Plaintiffs Failure to Request Additional Medical Services."

On Page 4, lines 9-19, the Opinion errs in attributing an argument to the appellant which was not made. The Opinion by destroying this straw argument would appear to generate false support contrary to the appellants position.

It certainly is not true that the appellants ever made the contention that only "physical condition is involved in determining disability". Again, the error of denying oral argument effectively bars informing each member of the presiding panel that the contention of the applicants is not that. The Opinion cites the Goolsby case, 80 NM 59, 451 P2d 308 (Ct. App. 1969) which was never questioned by anybody in this case. If appellants' contention was that "only physical condition is involved in determining disability" then it is agreed that on this particular point oral argument is unnecessary; however in fact, the matters urged by the appellants and argued by the appellee are not matters decided by the Goolsby case, supra.

The Opinion is further in error in structuring the case in a manner at variance with the trial level. The appellants urged as error the submission of certain Findings and Conclusions of Law, Page 11, and the court below did not make said Findings nor did it make any contrary findings. We submit it is error for the court to refuse to decide such issues, but the Opinion, without allowing any Argument, fills in this gap which is actually a trial court function. What is presented is, how do you appeal an appellate court's assumptions of a trial court's duty and obligation? To structure an opinion that presents this impossible situation, we submit, is error.

The Opinion says that "The trial court found that plaintiff was totally disabled at the time of trial and had been since the accident on December 31, 1973" as a means of finding against the appellants' contentions. We submit the Opinion never got to the contentions actually raised by the appellants. There are certain matters which cannot, consistent with objective realities, be summed up by the phrase "defendants ask us to weigh the evidence, determine that Dr. Hollinger was not to be believed and hold that the facts are those inferable from Dr. Parnall's testimony." Quite the contrary is true. The matter was presented to the court and not decided. See Page 11 of Appellants' Brief-in-

Chief. One specific instance is the issue of the adequacy of medical services provided by the employer. (Page 12) It is not that the trial court ruled adversely to our position, it is simply that it did not rule at all. It certainly is not consistent with the case as we recall trying it, briefing it and reading it from the transcript. That we have ever asked this court in this case, or in any other case, to perform the function of weighing the evidence is error.

Error is urged in ignoring the New Mexico case of *Beckwith v. Cactus Drilling Corporation*, 84 NM 565, 505 P2d 1241 (1973) in connection with the question of providing medical services and treating the matter as if there was no relationship to this case when, in fact, it was the principle question relied upon by the appellants. Again, an opportunity to show and to argue Beckwith, supra, is error.

Error is claimed in the Opinion because of the inapplicability of the facts in *Johnson v. Armstrong & Armstrong*, 41 NM 206, 66 P2d 992 (1937). It is urged that the facts therein related do not aply to this case nor does the language cited in the Opinion refer to anything but "cases of emergency like the one here considered" and actually the Johnson case, supra, was primarily concerned with the validity of a suit by a physician against the compensation carrier and arising out of a settlement. Again, this was not a decision at the trial level, but erroneously constituted a trial as to the matter at the appellate level with no opportunity to persuade the appellate court thus acting as to the inapplicability or validity or appropriateness of the cited authority as to the question involved.

Error is claimed relative to the ruling and interpretation of Sec. 59-10-19.1 (B) and its applicability to the facts of this case. Basis of error is that it is unrealistic per se since the Opinion abstracts a practical provision of the statue and posits an impossible, impractical and unrealistic burden upon the employer and in effect nullifies the act and

it construes the section referred to above so as to uphold the ruling of the court below.

The denial of oral argument only serves to prevent and bar an opportunity to show the inappropriateness of the ruling in the Opinion on this matter and the use of judicial legislation. To hold that the use of such a term as "passive willingness" as a term written into the provisions of the statute is an indication that an oral argument should have been allowed or should be allowed now at this stage of the proceeding. The trial judge did not rule on that basis. The appellee did not argue on that basis. To introduce into the law of compensation this new phrase is to go against the law of the case and amounts to, in effect, a trial court Finding of Fact or resulting Conclusion of Law for the first time. It is, in effect, to take over the rulings of the trial at the appellate level which in itself and by denying oral argument is in reality a denial of an appeal and by our constitutional provisions, one appeal is guaranteed. The trial judge ruled on this issue on TR 266. The quality of an oral argument that could have been advanced may not have altered the result, but again history is replete with instances where a more complete treatment of principles and a more comprehensive arrangement of facts on which a principle is based has produced contrary results from what was first thought to be conclusive. Attention is directed to Pages 265 through 287 showing what we respectfully submit is the impracticality of the matter. The approach of the Opinion on this subject, we submit, is error. We respectfully submit that to consider what the claimant did in the period immediately following the accident, and by that I mean up until April, indicates no reason for the employer to be alerted to the furnishing of medical services. One of the strong bits of evidence there is Dr. Francis' bill was never submitted or offered in evidence in this case. The claimant left employment denying injury. The claimant applied for another job disclaiming injury. Is the employer bound to set up some type of continuing surveillance after an employee has left his employment? TR. 280. Is an employer now obligated

to those persons who have sustained an injury in the course of employment and terminated to give them some type of written assurance or promise that medical services will be furnished in the future when there is no indication of any injury? Is the employer obligated to know by some system of investigation that the claimant was contacting Dr. Francis? (TR 284). We respectfully submit that the court's ruling here and of itself is grounds for a new trial.

Under standard methods of procedure, the only judge the parties at the trial level can take issue with is the trial judge. The law of the case become highly significant. There would be no way in which any party could ascertain that this question of medical expenses under Section 59-10-19.1, supra, would be decided on a phrase more than "passive willingness" and that in effect the employer has to make a record of some kind in order for the phrase to apply. When the phrase and interpretation comes at the appellate level there is no opportunity to present evidence on the question. Result, the law of the case, in this instance, was established by the Opinion without oral argument and due process was denied because there was no opportunity to respond to a requirement that either system of some continual observation, post-employment, or some type of notice at the time of termination.

The Opinion uses the phrase "they must have affirmatively offered the services". It is respectfully submitted that this cannot be done unless there is knowledge of the need for the services. Defense counsel made this statement ". . . what she says to the employer has everything to do with — or doesn't say, has something to do with the nature and extent of her injury." (TR. 258) We submit that the court's Opinion is an improper interpretation inconsistent with the statute and its purpose. To allow treatment for injuries to be recoverable without notice of even the existence of a claimed injury at the time of termination or any time thereafter, allows the development of a potential lawsuit

without any opportunity of investigation, treatment or observation.

The denial of this opportunity is not solely a denial of a practical, legal or financial opportunity to the employer, but also could be a disadvantage to the claimant. Workmen's compensation injuries are more than a trial in a court. They are physical factors also. To establish as a matter of policy that a workman can disregard the employer and the employer's medical services and can disregard notice to the employer of even the existence of an injury for which he seeks treatment long after termination of employment, and can continue to take treatment of an extensive nature with great medical expense, all without notice, at least for a period of a year from the time of the accident, can encourage the selection of physicians as a matter of social legal policy, which position may be motivated more as to the physicians ability to perform in legal medicine and prevent the opportunity to the claimant to have highly qualified physicians made available to her for the treatment of injuries. Since we are dealing with an interpretation of a statute for the first time, we submit that the practical consequence, including the physical well-being of the claimant and her rehabilitation, are also factors to be considered. We submit that it is of some significance in this case that very early, at least in January or February, the claimant had an attorney. (TR. 268) Therefore, if notice of a continuing injury to the employer or of the need for medical service was present, it certainly must be presumed that knowledge of the compensation act was available for and on behalf of the plaintiff and could have been exercised. Many factors may rightfully be considered in this regard which we respectfully submit point to a very helpful function in an oral argument.

It is further submitted that without an oral argument, the attorneys fees are excessive and that to enter a Judgment in that amount ($3,000) without an opportunity for oral argument is further grounds that due process under the Federal Constitution and the State Constitution is lacking.

We respecfully request an opportunity to present all of these arguments and request a rehearing on this case because of the errors and the denial of the opportunity to present oral argument.

KLECAN & ROACH, P.A.

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I HEREBY CERTIFY that a true copy of the foregoing was delivered to opposing counsel this 28th day of January, 1977.

E. E. KLECAN

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Defendants-Petitioners,

No. 2547

-vs-

ORIGINAL PROCEEDING ON CERTIORARI

MARY ANN GARCIA,

Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI

For the Plaintiff-Respondent:

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MR. MARK J. KLECAN

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Petitioners,

vs. No. 2547

MARY ANN GARCIA, ORIGINAL PROCEEDING

Plaintiff-Respondent ON CERTIORARI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was delivered to Ortega, Snead, Dixon & Hanna, Attorneys at Law, this ... day of February, 1977.

KLECAN & ROACH, P.A.

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ARGUMENT AS TO POINT O, i-vi WHICH QUESTIONS RAISE THE QUESTION OF ELIMINATION OF ORAL ARGUMENT.

Rule 18 of rules governing appeals to the Supreme Court and Court of Appeals, N.M.S.A.
indicates that it is error to do what the Opinion did in stating "oral argument is unnecessary".

Rule 18 (b) speaks of motions and states that oral argument is discretionary in regard to *motions.* We, therefore submit that oral argument is indicated as a matter of right in the appellate review of the entire case.

We also submit that Rule 18 (c) entitled "Request for Oral Argument" indicates that oral argument is required by the rules since it states that without a request oral argument "will be deemed waived". We ask the legal question: How can a party waive something which is not his as a matter of right? We assert the right to oral argument by this question: Does not the private practitioner of law and does not private litigants have rights which must be recognized by the government acting through its judiciary at the Court of Appeals level? Is not this right of oral argument one which a government cannot disregard under some type of judicial discretion?

Furthermore, Sections (d), (e), (f) and (g) concern the procedures and limitations upon the type of oral argument and methods of oral argument covered by the rules. However, we submit that these sections are on the assumption that there is a right to oral argument.

Rule 18 (a) indicates that settings for oral argument will be fixed by the court. Does this not indicate that the question of the existence of the right to oral argument is assumed? We conclude that Rule 18 does require that the government acting through its judiciary grant oral argument under the conditions as specified therein. We submit

that the fact this constitutes a pronouncement from the judiciary rather than the legislature does not indicate it can be withheld at the choice of a particular court in a particular case. When this is done, it violates the equal protection of the laws and becomes violative of that right as guaranteed by the Constitution of the State of New Mexico and the Constitution of the United States of America, Fourteenth Amendment, both of which are restrictions placed upon a governmental body and at the same time a guarantee of a right to a private citizen. Looked at from the viewpoint of who almost universally makes oral argument, we respectfully submit that the private practice of law being an integral part of our judicial system in its functions is entitled to the constitutional guarantees of the New Mexico Constitution and of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that whatever the reason, lack of time, overcrowded dockets, etc. is not any basis for a denial of a right for oral argument such as is provided under Rule 18 and as we submit, which is fortified by constitutional provisions as stated above.

Oral argument is also made mandatory by New Mexico Supreme Court Miscellaneous Rules. Rule 1, N.M.S.A. 16-2A-1 (b) uses mandatory language in stating that settings for oral argument *will* be fixed by the court and notice given to counsel. Other language in that rule enforces the fact that oral argument is mandatory. It is also clear that the Rules of Practice and Procedure of the Supreme Court are also made applicable to the Court of Appeals. N.M.S.A. 21-2-2, 1953 Comp. Rule 2 of the Miscellaneous Rules, N.M. S.A. 16-2A-2 (d) also makes it a mandatory function of the Clerk of the Court to make up calendars for oral argument and give attorneys at least five days notice of the setting for oral argument. Again the language in both of these rules is mandatory as far as oral argument is concerned.

It is further a violation of procedural due process to

allow some appeals oral argument and others not with no set rule of procedure defining which cases would qualify for oral argument and which does not. It is clear that a state may prescribe rules of a public procedure, but such rules governing appeals must apply uniformly to all cases. 16 Am. Jur. 2d, Constitutional Law, Sec. 584.

CONCLUSION

The Court of Appeals' decision in the case at bar makes sweeping changes in the Workman's Compensation Law of the State of New Mexico. Yet, no opportunity was given for oral argument. Because of the numerous conflicts with prior appellate decisions in this State, and because of the issues of substantial public interest involved, petitioners seek the issuance of a writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

STATE, ex rel, GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Petitioners,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and the HONORABLE JOE W. WOOD,

Respondents.

PETITION FOR WRIT OF MANDAMUS

COME NOW the Petitioners, Genuine Parts Company and Sentry Insurance Company, and state:

1. That Petitioners were defendants in a Workmen's Compensation proceeding which was tried in the District Court of Bernalillo County. Petitioners took an appeal from a final judgment awarding a recovery to the claimant, which appeal is taken to the Court of Appeals for the State of New Mexico.

2. That the Court of Appeals in an opinion written by Chief Justice Wood affirmed the decision and judgment of the lower Court of Bernalillo County by an opinion dated and filed in the Court of Appeals on January 18, 1977.

3. That the Petitioners filed a motion for rehearing

which was denied by the Chief Judge on January 31, 1977. The petition for rehearing had been filed on January 28, 1977. Petitioners filed a petition for certiorari on February 21, 1977 in the Suprome Court of the State of New Mexico. The same being case No. 11293 in the Supreme Court of New Mexico. The Supreme Court of New Mexico denied the petition for certiorari in Court of Appeals No. 2547, and notice of the denial of the petition for writ of certiorari was received by Petitioners on March 2, 1977. A copy of the Court of Appeals opinion in Court of Appeals Cause No. 2547 is attached hereto as Exhibit I. On March 2, 1977, a mandate from the Clerk of the Court of Appeals of the State of New Mexico was issued. A true copy of the mandate was received by the Petitioners on March 4, 1977. A copy of the same is attached to this petition as Exhibit II.

4. That page 9 of the Court of Appeals opinion which is in one paragraph and is the last page of the opinion is the subject matter of this petition. In particular, the statement on line 1 of page 9, "Oral argument is unnecessary; the judgment is affirmed."

5. That the above quoted statement in the opinion is claimed to be in violation of the Constitution of the State of New Mexico, the Constitution of the United States of America, Article XIV, the Rules of Court Governing Appeals under the specific circumstances of the appeal and applicable constitutional provisions and rules.

6. That this petition is not based upon a broad question of whether an oral argument is required under all circumstances and conditions. The petitioners contend a violation of due process and/or improper and illegal and unauthorized procedure by the Appellate Court of the State of New Mexico in stating for the first time at the conclusion of an opinion that "oral argument is unnecessary" under the circumstances of this case which are as follows:

A. The Court of Appeals of New Mexico prepared

and mailed to appellee and appellants a form entitled Request for Oral Argument. This is standard procedure.

B. Appellee and appellants both responded to the request and requested oral argument.

C. The Court of Appeals did not withdraw request for oral argument.

D. The Court of Appeals did not indicate in any way a denial of request for oral argument.

E. The Court of Appeals decided the case then stated "oral argument is unnecessary." Conclusion, due process and/or proper procedure was denied to appellants.

7. That in addition, your Petitioners are informed and believe that over a period of more than 20 years, Petitioners' attorney of record had been frequently in the Appellate Court of the State of New Mexico. That over this extended period of time, with one exception[1], any request for oral argument on an appeal was never taken away from Petitioners' attorney.

8. That to Petitioners' knowledge, no change over this period of time has been made in the procedures for an appeal in the Appellate Courts of New Mexico which would tend to diminish the right to an oral argument on an appeal.

9. That the request form for oral argument by virtue of custom and practice and existing rules of procedure for appeals which, at a minimum, require some type of notice to your Petitioners if the same were to be abruptly ended and a precedent of such long-standing abolished in such a fashion as was done in this particular instance.

10. That the allegedly wrongful act of the Court of Appeals by eliminating in such a fashion an oral argument

[1]*Barbieri* vs. *Jennings*, Court of Appeals decision entered on November 30, 1976.

in this cause is a procedure which was initially executed in the opinion in the Court of Appeals for the first time and for which any possible opportunity of opposition or persuasive argument was eliminated. Right of representation was thereby reduced in violation of the United States Constitution and the New Mexico Constitution (Fourteenth Amendment, United States Constitution; Article II, Section 18 of the New Mexico Constitution).

11. That the elimination of the oral argument at that stage of the proceeding, unannounced and without opportunity for opposition, is the elimination of the practice of law in the State of New Mexico to the extent that it has functioned for decades in this State. This constitutes, as to the Petitioners, a violation of due process under the United States Constitution's Fourteenth Amendment and the New Mexico Constitution, Article II, Section 18.

12. That N.M.S.A. §21-3-1 demands that Rules not abridge or modify the "substantive rights of any litigant." That the litigant has the substantive and/or due process right not to have procedural steps eliminated contrary to law.

13. That the failure to establish any standards by which oral arguments would be considered necessary or unnecessary is in itself a violation of the Constitution and the rights of your Petitioners under the Constitution of the United States under the Fourteenth Amendment and the Constitution of New Mexico.

14. That an unstandardized assertion of the lack of necessity for oral argument in a Court of Appeals is in violation of the equal protection of laws guaranteed to citizens of the United States by the Constitution of the State of New Mexico and by the Fourteenth Amendment to the Constitution of the United States of America. That oral arguments on all cases has not been abolished. Only an isolated case is denied the right without any standard of measurement. That such a procedure having no basis or guide is a denial

of the equal protection clause of due process. That to deny these litigants an oral argument is to discriminate against them with no valid reason for the same. (Violation of the Fourteenth Amendment of the Constitution of the United States of America).

15. That the act of the Court of Appeals to have arbitrarily selected these litigants as the subject of their discriminatory act is to directly attack the right of representation by counsel and is itself unconstitutional.

16. That the Constitution of the State of New Mexico guarantees the right of an appeal in a civil action. That the due process clause of the Constitution of the State of New Mexico and the Fourteenth Amendment of the Constitution of the United States guarantees that an appeal must be one in which due process and equal protection of the laws is accorded to all litigants. The Constitutional guarantees are for the benefit of the private litigants and are not subject to being abrogated or set aside by the actions of the Court of Appeals.

17. That if the long-established procedure of oral argument be considered a Rule of Procedure then the same cannot be eliminated by the Court of Appeals since they would be and did exceed "their" powers and invaded the power of the Supreme Court. (§21-3-1) That the method of the Court of Appeals in any event is in violation of due process which requires a Rule to be promulgated 30 days prior to its effective date. (§21-3-1 B) That the action of the Court of Appeals is in legal and constitutional violation of the same. (Fourteenth Amendment, Constitution of the United States; Due Process Clause, Constitution of New Mexico).

18. That the regulation of the practice of law is not within the province of the Court of Appeals. That the decision of the Court of Appeals in the instant case is a usurpation of a judicial function. That the statutes wherein regulation of the practice of law is granted to the *Supreme*

Court provides that the same shall be done by Rule. (N.M. S.A. §18-1-1). That the action by the Court of Appeals was not done by Rule and is by that very fact unauthorized and unconstitutional. (Fourteenth Amendment, Constitution of the United States; Due Process Clause, Constitution of New Mexico).

19. That the right to an oral argument is expressly granted and made mandatory as to the Appellate Court by Rule 18, Rules of Appellate Procedure for Civil Cases, N.M. Stat. Ann. §21-12-18 (1975 Pocket Supp.) wherein at Rule 18(c) there is the following language:

> Oral argument . . . *will be allowed* . . . of thirty minutes on each side as to all other matters. (Emphasis added).

The term "other" includes the hearing on the appeal. A copy of Rule 18 is attached hereto as Exhibit III.

20. That the "time" permitted, i.e. 30 minutes, can be "extended or abridged," Rule 18(e). N.M. Stat. Ann. §21-12-18(e) (1975 Pocket Supp.), but it cannot be eliminated. The meaning of "abridged" is "shortened, condensed". The World Book Dictionary, Vol. 1, 1974 Edition, Published by Thorndike Barnhart.

21. That Rule 18(a), supra, uses mandatory language in requiring the Court to set oral argument and in requiring the Clerk to give notice thereof. Rule 18(a), supra. N.M. Stat. Ann. §21-12-18(a), supra.

22. That Mandamus lies to compel the Court of Appeals to "fix" a sitting date for oral argument.

23. That Mandamus lies to require the Clerk of the Court of Appeals to give "notice" of the date of the oral argument to all parties.

24. That Mandamus lies to compel the Court of Appeals

to accord the litigants the oral argument which all parties have requested.

25. That Mandamus lies to compel the Court of Appeals to allow the parties through their attorneys the right to make an oral argument in behalf of their clients.

26. That Mandamus lies to compel the Court of Appeals to recall its mandate to the District Court of Bernalillo County and to withdraw its opinion rendered prematurely and in violation of the legal and constitutional rights of the parties and in violation of its own Rules of Appellate Procedure.

27. That the omission of legally necessary steps in the appellate procedure is good cause for the recall of a mandate.

28. That Mandamus lies to reinstate an appeal dismissed in effect by improper procedure.

29. That Mandamus lies to require that an appeal be heard by Justices who did not participate in a prior improper appeal.

30. That the rule-making power of the Supreme Court as to the Court of Appeals carries with it the power to compel adherence to the Rules and Mandamus is the proper procedure for so doing.

WHEREFORE Petitioners pray that a Writ of Mandamus issue to the Court of Appeals, to the Honorable Joe W. Wood, and to the Clerk of the Court of Appeals of the State of New Mexico, compelling them to withdraw an opinion and mandate heretofore filed in Court of Appeals cause number 2547, and to accord to Petitioners an appeal pursuant to law and that said Court and its members and Clerk take appropriate steps to recall the mandate heretofore issued and reinstate the cause on the docket of the

Court of Appeals or to certify said appeal to the Supreme Court of the State of New Mexico.

That a Judgment on the mandate has not been entered.

Respectfully submitted,

KLECAN & ROACH, P.A.

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STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Comes now the undersigned on behalf of Petitioners Genuine Parts Company and Sentry Insurance Company and under oath deposes and says: That he verily believes the facts contained in the foregoing Petition to be true to the best of his information.

EUGENE E. KLECAN

SUBSCRIBED AND SWORN to before me this ..... day of March, 1977.

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Notary Public

My Commission Expires:

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